FILE COPY

FILED
JUL 18 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-288

MELVIN R. LAIRD, Secretary of Defense, *et al.*,

Petitioners,

—v.—

ARLO TATUM, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REHEARING

FRANK ASKIN
Rutgers Law School
180 University Avenue
Newark, New Jersey 07102

MELVIN L. WULF
JOHN H. F. SHATTUCK
American Civil Liberties Union Foundation
156 Fifth Avenue
New York, New York 10010

Attorneys for Respondents

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-288

MELVIN R. LAIRD, Secretary of Defense, *et al.*,

Petitioners,

—v.—

ARLO TATUM, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REHEARING

1. The opinion in this case overlooked a fundamental aspect of the pleadings and therefore came to an erroneous conclusion.

The opinion by the Chief Justice is written on the assumption that the only injury alleged by respondents was the chill imposed upon their First Amendment rights by the Army's surveillance program (Slip Op., p. 9). Proceeding from that assumption, the opinion holds that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; . . . " (Slip Op., pp. 12-13).

That assumption, however, is wrong, for the fact is that respondents' complaint alleged, and their brief before the Court stressed, the existence of the specific harm said to be absent.

In addition to the chilling effect allegation set out separately in paragraph 16 of the complaint (App. 10-11), paragraph 15 of the complaint (App. 10) alleged that

> 15. The purpose and effect of the collection, maintenance and distribution of the information on civilian political activity described herein is to harass and intimidate plaintiffs and others similarly situated and to deter them from exercising their rights of political expression, protest and dissent from government policies which are protected by the First Amendment *by invading their privacy, damaging their reputations, adversely affecting their employment and their opportunities for employment, and in other ways* [emphasis supplied].

Paragraph 17 of the complaint (App. 11) alleged that

> 17. The conduct of the defendants described herein *deprives plaintiffs* and persons similarly situated *of the rights of free speech and association, the right to petition their government for redress of grievances, and the right of privacy guaranteed and protected by the First, Fourth, Fifth and Ninth Amendments to the Constitution of the United States,* and deprives all Americans of basic First Amendment rights by inhibiting and curtailing free and open discussion of issues of public importance [emphasis supplied].

These allegations of specific harm were repeatedly stressed in respondents' brief at pp. 7-8, 9-10, 31-32, 35, 37-38, 43, 61-66 and 81-82.

The "specific present objective harm" alleged by respondents involves more than injury to First Amendment rights. Indeed, at pp. 81-82 of their brief, respondents reminded the Court that even under "the stricter rules of standing that apply to constitutional cases arising *outside* the First Amendment area, [they] would nevertheless have standing to sue because they have alleged 'that the challenged action has caused [them] injury in fact, economic or otherwise . . .' *Association of Data Processing Service Organization, Inc.* v. *Camp,* 397 U.S. at 152-53."

Notwithstanding these clear and unambiguous assertions of specific harm, both to First Amendment and non-First Amendment interests, the opinion of the Chief Justice makes no reference to them whatsoever and treats the case as if it involved only an "abstract" claim of chilling effect. The opinion's reliance upon *Ex Parte Levitt,* 302 U.S. 633 (1937) and *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947), necessarily assumes that respondents are mere intermeddlers and their claims hypothetical, but they are in fact subjects of surveillance[1] and they allege that their injury is actual and specific. Indeed, the real basis for the majority's conclusion is that respondents' allegations are not sufficiently developed, but this is a result of the District Court's refusal to allow an evidentiary hearing.

By omitting to acknowledge the existence in this case of claims of specific harm—alleged in the complaint and stressed in the brief—the majority has fatally deformed the foundation upon which its opinion rests.

---

[1] Paragraph 10 of the complaint (App. 9) alleges "specific action of the Army against them" and Exhibit A of the complaint (App. 13-21) describes how respondents' activities were monitored by the Army.

2. Even if the allegations of specific harm are for some inexplicable reason to be ignored, the opinion by the Chief Justice rests on facts asserted by petitioners, denied by respondents, and unresolved by trial.

In the present posture of the case—dismissal of the complaint under Rule 12(b)(6) for failure to state a claim—all facts asserted by the complaint must be taken as true and all facts asserted by the defendants must be disregarded.[2] Proper acceptance of the allegations in the complaint emphasizes the claim persistently put forward by respondents in their brief (pp. 19, 23, 31-33, 60, 91, 92) that the case must be remanded for a trial on the issues of fact. Neither the District Court nor the majority opinion, however, properly excluded contested fact matters in considering the sufficiency of the complaint.

There are five assertions of fact recited in the opinion of the Chief Justice to support his conclusion that injury to the respondents is too remote and speculative to satisfy the principles of justiciability. Each of these items is recited as "fact", but they are all contested allegations not yet proven in the crucible of trial, or mere speculations wholly without basis in any of the pleadings.

---

[2] The facts asserted by the defendants in the affidavit of Thaddeus R. Beal, dated March 19, 1970, were put forward solely in support of their Opposition to Plaintiffs' Motion for a Preliminary Injunction (App. 73) and cannot be taken as true on their motion to dismiss the complaint. "In passing on a motion to dismiss because the complaint fails to state a cause of action, the facts set forth in the complaint are assumed to be true and affidavits and other evidence produced on application for a preliminary injunction may not be considered." *Land* v. *Dollar*, 330 U.S. 731, 735 (1947). The principle that in determining the sufficiency of the complaint under Rule 12(b)(6) the District Court was bound to exclude all fact allegations outside the complaint was fully described in respondents' brief, pp. 8 and 9, notes 10 and 11.

a. The majority opinion asserts that "[t]he [surveillance] system . . . consisted essentially of the collection of information about public activities that were thought to have some potential for civil disorder" (Slip Op., p. 5).

Former intelligence analysts from the Army's Counterintelligence Analysis Branch (CIAB) in Washington, D.C. are prepared to testify on behalf of respondents that reports on public activities likely to develop into civil disorders requiring military action constituted a tiny portion of all the reports they received in performing their duties from 1967 to 1972. Fifteen former agents from various sections of the United States would testify that their units conducted an indiscriminate surveillance by direct agent observation of virtually all demonstrations involving twenty or more demonstrators, regardless of the potential for violence.

Former Army undercover agents are prepared to testify that they personally infiltrated private meetings of antiwar groups. Agents assigned to college campuses would testify that they obtained access to confidential student files. Documents will prove that Army intelligence agents infiltrated classrooms to monitor what was being taught. Army intelligence coordinators (clerks) would explain how they maintained extensive card files, dossiers, and photographs of civilians who were not associated with the armed forces and who had done nothing to indicate that they intended to incite, agitate, or precipitate violence. These witnesses would testify that Army intelligence assumed the right to monitor all civilian political activity in the United States, no matter how lawful and peaceful, and did not inquire into its legal authority to do so.

Examination of the computer print-outs and publications now being preserved for this litigation will confirm this testimony. They will reveal that computerized data centers at Fort Holabird, Fort Hood, Fort Monroe, and McDill Air Force Base independently developed the capability of producing round-up lists of political protesters. These files will also reveal that Army intelligence maintained extensive records on the finances, psychiatric records, and sex lives of civilians who posed no threat to military security or civil order.

In addition, respondents can prove that reports on lawful political activity were taken from the Intelligence Command's highly inaccurate civil disturbance wire service and filed in the dossiers of persons who had held, were holding, or were being considered for security clearances, thus contaminating what are supposed to be investigative reports with unverified rumor and gossip.

Finally, respondents are prepared to show that the collection of information on the political activities of individuals and organizations not only was intended to carry out an unauthorized and unwarranted interpretation of the Army's civil disturbance mission, but also was used to compile voluminous "subversives files" which could cost respondents and members of respondent organizations positions with the federal government and defense industry.

b. The Chief Justice finds it "significant that the principal sources of information" contained within the Army's computer data bank "were the news media and publications in general circulation" (Slip Op., p. 5). There is no authority given for this statement and there is no such

fact in the record before the Court. On the contrary, the complaint alleges at paragraph 8 that the information "was acquired by defendants' agents' surveillance . . . , by anonymous informants, and through the use of photographic and electronic equipment."

Analysis of the Continental Army Command's computerized incident data bank will reveal that only five percent of that collection agency's incident reports came from the news media. Former analysts at CIAB, the principal users of domestic intelligence within the Army, will testify that most of the reports they received were official documents not "in general circulation." Documents will prove that fully one-third of all spot reports generated by the Army Intelligence Command during the spring of 1969 were based on direct agent observation. At that time, spot reports were running at the rate of 1,200 a month.

Witnesses also will testify that other sources of CONUS intelligence included undercover agents, informants, confidential student files, credit union files, and bank records. In addition, documents will prove the use of electronic equipment in violation of Section 605 of the Federal Communications Act of 1934, as interpreted by both the Department of Justice and the Army's Judge Advocate General:

c. The majority concluded that "the total intelligence operation concerned with potential civil disorders hardly merits description as 'massive'" (Slip Op., p. 6). The opinion states, for example, that ninety-four percent of the time of the approximately 1,000 Army agents involved in domestic intelligence operations is devoted to security investigations of the Army's civilian employees and contractors' employees (Slip Op., pp. 5-6 and n. 4). This

"fact" is apparently adopted from the February 25, 1970 letter of the Army General Counsel Robert Jordan (App. 52) which was submitted by plaintiffs in support of their motion for a temporary restraining order. But the impropriety of accepting Mr. Jordan's claims as established fact is emphasized by his subsequent admission that he had been misled by military personnel about the scope of the Army's domestic intelligence program, and did not learn the true facts until he visited Fort Holabird with Assistant Secretary of the Army Beal in June 1970. See Ervin Hearings, Vol. 1, p. 462. This subsequent information would, of course, be elicited at trial and the broad scope of the Army's program, beyond security investigations, would be proved.

No term but "massive" can possibly describe the scope of the Army's surveillance and files. Plaintiffs are prepared to prove that the Army maintained over 350 separate records centers on civilian political activity. Documents will show that at least five of these data centers employed computers to store information on individuals, organizations, and incidents, and that one used a computer to index its microfilm archive.

Respondents also can show that these data banks contained files on hundreds of thousands of law-abiding citizens. Government inventories of non-computerized data holdings will be introduced to prove that some of the CONUS armies maintained files on more civilians than some of the centralized computerized data banks. Thus inventories will show that Fourth Army headquarters at Fort Sam Houston, Texas, maintained over 120,000 "locator cards" on individuals and organizations. Other inventories will show that the Intelligence Command main-

tained—and continues to maintain—211,243 dossiers on organizations and 80,731 files on individuals. These files are in addition to the approximately seven to nine million security clearance dossiers which have been contaminated with CONUS intelligence reports and the computer data bank which has been ordered destroyed.

d. The opinion asserts that the "blacklist" and the records in the Fort Holabird data bank "were found to be unnecessary and were destroyed" by the Army (Slip Op., p. 6). No authority is cited for the statement; it was apparently adopted from the affidavit of Under Secretary of the Army Beal submitted in support of defendants' motion to dismiss (App. 69-73).[3]

But the Holabird computer bank was only one of many data repositories maintained by defendants (see Brief for respondents, pp. 13-14) and the "blacklist" was only one means of circulation of that data which respondents had cited. Thus, the opinion, by crediting as a significant fact Secretary Beal's claims regarding the Holabird data bank and the "blacklist", while ignoring the parallel surveillance apparatus which he failed to discuss in his affidavit, leads to the false conclusion that respondents' grievances have been fully redressed.

---

[3] Orders to destroy the Fort Holabird data bank were issued on February 19, 1970. Respondents can prove, however, that on July 10, 1970 it was discovered that the entire data bank could be reconstituted. Later an "inactive tape" was discovered and ordered destroyed on October 17, 1970. These and other evasions prompted the Army General Counsel to order an Inspector General's investigation of the entire Army Intelligence Command during the fall of 1970. This investigation determined, among other things not then known to the respondents, that spot reports ordered destroyed on March 9, 1970 and again during June and July 1970 were still in existence at Intelligence Command headquarters in December 1970.

Respondents can prove that as of August 26, 1970, certificates of destruction had been received for only 46% of the blacklists which had been ordered destroyed on February 18, 1970. Given the pattern of evasion of the cutback orders documented in the Ervin Hearings, at pp. 156, 157-59, 160, 162, 281, 331, and 462, respondents submit that it would be proper to conclude that less than 46% of the blacklists were actually destroyed.

e. Finally, the opinion unquestioningly accepts the Army's self-serving directives and declarations, contained in "briefs for petitioners filed with this Court," that its domestic intelligence activities have been "significantly reduced" (Slip Op., p. 7). The respondents, however, devoted an entire section of their brief (pp. 88-91) in anticipation of the suggestion that the Army's program had been dismantled, and explicitly stated that "they could show at trial that a substantial portion of the apparatus, and the information which it has collected, is still in existence" (Brief for Respondents, p. 89). Nonetheless, the opinion accepts the Army's unilateral version of the facts.

In addition to the Army's failure to destroy its blacklists and data banks, the respondents can show through the testimony of former agents still other evasions of the directives which the Court's opinion assumed to have been obeyed. One undercover agent would testify that he was ordered to continue his infiltration of an anti-war group for months after the June 9, 1970 cease-and-desist order. Respondents can also show that this and other infiltrations violated the McGiffert and Beal memorandums of February 5, 1969 and April 24, 1969 respectively, in that the infiltrations were undertaken without prior authorization from the Under Secretary of the Army.

Accordingly, respondents respectfully submit that they can disprove each of the five factual assertions on which this Court's characterization of the Army's surveillance program and conclusion as to its effect are based.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted,

FRANK ASKIN
Rutgers Law School
180 University Avenue
Newark, New Jersey 07102

MELVIN L. WULF
JOHN H. F. SHATTUCK
American Civil Liberties Union Foundation
156 Fifth Avenue
New York, New York 10010

Attorneys for Respondents

Counsel for respondents gratefully acknowledge the assistance of Mr. Christopher H. Pyle, former captain, United States Army Intelligence Command, in the preparation of this petition.

Certificate of Counsel.

As counsel for the petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

.....

Counsel for Petitioners